

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 92-3-P-H
)	(Civil No. 97-134-P-H)
WALTER E. FAY,)	
)	
Defendant)	

**MEMORANDUM DECISION ON GOVERNMENT’S
MOTION FOR RECONSIDERATION AND
RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Walter E. Fay moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Fay pleaded guilty to bank robbery, a violation of 18 U.S.C. § 2113(a) & (d), use of a firearm during a crime of violence, a violation of 18 U.S.C. § 924(c)(1), and possession of a firearm by a felon with three prior violent felony convictions, a violation of 18 U.S.C. § 924(e)(1). Judgment (Docket No. 23) at 1. He was sentenced on August 7, 1992 to a term of 320 months imprisonment. *Id.* at 2. He contends that all of the prior convictions used to enhance his sentence occurred in Massachusetts, that all of his rights were restored in Massachusetts by operation of law seven years after the time of conviction, or by 1986, and that he was therefore wrongfully sentenced as an armed career criminal. Petition (Docket No. 31) at 5.

The government was ordered to answer the motion on April 25, 1997. Docket No. 32. In response, the government has filed a motion seeking reconsideration of that order. Government’s Motion for Reconsideration of the Court’s Order Directing the United States Attorney to Respond

to the Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C., Section 2255 (Docket No. 34). Upon closer examination of the record, I agree with the government's position that, without more, this claim is subject to summary dismissal under Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that the petitioner is not entitled to relief based on his allegations, and accordingly I recommend that his motion be denied without an evidentiary hearing.

Although represented by counsel, the petitioner's motion was not accompanied by a memorandum of law and the motion itself does not refer to any authority in support of his claim. A convicted defendant is subject to sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), when he has at least three previous convictions for a violent felony and/or serious drug offense. The petitioner presumably seeks to challenge his sentence in light of *United States v. Caron*, 77 F.3d 1 (1st Cir. 1996) (*en banc*), in which the First Circuit made a significant change in the circuit law governing the range of prior convictions that may be used as predicate offenses under the ACCA. *Id.* at 5 (overruling *United States v. Ramos*, 961 F.2d 1003 (1st Cir. 1992)). By statute, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" may not serve as a predicate conviction for purposes of the ACCA "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. §

921(a)(20). In this context, civil rights “generally encompass the right to vote, the right to seek and hold public office, and the right to serve on a jury.” *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (citations and internal quotation marks omitted), *cert. denied*, 117 S.Ct. 1344 (1997). *Caron* established that “individualized action” is not required to restore a defendant’s civil rights within the meaning of section 921(a)(20); rather, the court held, a conviction under a Massachusetts law, for which the right to vote had never been deprived and for which the two other civil rights had been restored by virtue of a statute of general application, came within section 921(a)(20) and was therefore not a predicate offense. *Caron*, 77 F.3d at 5-6.

Subsequent to *Caron*, the First Circuit has had occasion to consider the other element of section 921(a)(20), which explicitly permits a prior conviction to be deemed a predicate offense for ACCA purposes, even when civil rights are restored, if the defendant remains prohibited from shipping, transporting, possessing or receiving firearms. In light of this provision, the court held that felony convictions under Massachusetts law are properly considered predicate offenses given that state’s statutory ban on handgun possession by ex-felons outside the home or business. *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1997); *see also United States v. Alston*, 112 F.3d 32, 37-38 (1st Cir. 1997) (same). The government contends that *Estrella* controls here, and I see no reason why it should not.

For the foregoing reasons, the government’s motion for reconsideration is **GRANTED** and I recommend that the petitioner’s motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 24th day of July, 1997.

*David M. Cohen
United States Magistrate Judge*